MIAMI REVIEW — MIAMI, FLORIDA

in the Supreme Court of the United States

OCTOBER TERM, 1976.

CASE NO. 76-638

FINANCIAL FEDERAL SAVINGS & LOAN ASSOCIATION,

Petitioner,

vs.

BURLEIGH HOUSE, INC.,

Respondent.

APPENDIX

LAPIDUS & HOLLANDER
Attorneys for Respondent
Suite 2222, First Federal Building
One S. E. Third Avenue
Miami, Florida 33131
Telephone: (305) 358-5690

MIAMI REVIEW — 371-4853 — 377-3721

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.

NO. 72-19709 (Goodhart)
General Jurisdiction Division

BURLEIGH HOUSE, INC.,
Plaintiff,

vs.

FEDERAL SAVINGS AND LOAN ASSOCIATION,
Defendant.

AMENDED COMPLAINT

Plaintiff sues Defendant and says:

1. This is an action for damages in excess of $5,000.00.

2. In February, 1969, Plaintiff, BURLEIGH HOUSE, INC., executed and delivered to the Defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, f/k/a Miami Beach Federal Savings & Loan Association, the attached mortgage and note in the amount of $7,800,000.00. Said note provides in part:

> "Interest only at the rate of Eight (8%) Percent per annum, shall be payable on the first day of each and every month hereafter, beginning March 1, 1969, and shall accrue from the date of the actual disbursement of funds, and

shall be based on amounts actually disbursed from the construction fund. Interest at the rate of Eight and Five Tenths (8.5%) Percent per annum on $7,000,000.00, less any principal reductions, shall be payable on the first day of each and every month thereafter commencing April 1, 1970.

"The entire unpaid principal indebtedness shall be due and payable on September 1, 1970."

3. At the time the note and mortgage were delivered, Plaintiff had contracted with Arkin Construction Company to build a highrise condominium building in Miami Beach. The proceeds of the construction loan were to be used to pay for construction of the building. FINANCIAL FEDERAL was told by the Plaintiff, and well knew, that it would be impossible to complete the building by April 1, 1970. The full construction fund was not to be disbursed until completion of the building.

4. Of the principal amount of the attached note, $323,188.00 was taken by the Defendants as a bonus or discount or interest willfully and knowingly exacted, taken and received.

5. Of the principal amount of the attached note, $192,810.00 was never disbursed.

6. On April 1st, 1970, $2,373,327.19 had been disbursed from the construction fund for the benefit of the Plaintiff. Pursuant to the terms of the note on that date the Defendant, Association, began charging and exacting from the Defendant, annual interest at the rate of $595,-

000.00 per year. This amounted to an effective rate of interest of 39.89%. The Defendant, Association, did not set aside the balance of the monies represented by the note. Despite this, they exacted interest on $7,000,000.00.

7. As further monies were disbursed by the Defendant/Association to the general contractor during the course of construction the effective rate of interest fell. Nonetheless, by November 11, 1970, the date upon which the loan had been completed, and repaid, the effective rate of interest over the course of the loan exacted by the Defendant from the Plaintiff pursuant to the attached note was 21%.

8. The above facts and the attached note constituted a scheme and device to corruptly reserve, charge or take, for a loan or advance of money, by way of contract, contrivance and device, interest at a greater rate than 15% per annum, in contravention of Chapter 687 F.S., F.S.A., the usury law of the State of Florida.

9. In contravention of said scheme, the Defendant did willfully, maliciously and intentionally exact from the Plaintiff, for a loan represented by the note attached hereto, interest of 21% per annum.

WHEREFORE, being injured, Plaintiff demands damages.

LAPIDUS & HOLLANDER
Attorneys for Plaintiff
410 City National Bank Building
Miami, Florida 33130 (358-5690)

By: Richard L. Lapidus

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Complaint was mailed to SAM DANIELS, Attorney for Defendant, 1414 DuPont Building, Miami, Florida 33131, this 16 day of April, 1973.

_____

Attorneys for Plaintiff

MIAMI BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION
MORTGAGE NOTE

Number_____ $7,800,000.00

Miami Beach, Florida February 26, 1969

After date, for value received, the undersigned, jointly and severally, promise to pay to the order of MIAMI BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, the sum of SEVEN MILLION EIGHT HUNDRED THOUSAND and No/100 ($7,800,000.00) DOLLARS, together with interest as hereinafter stated, at the rate of Eight and Five Tenths (8.5%) Percent per annum, payable as follows:

Interest only at the rate of Eight (8%) Percent per annum, shall be payable on the first day of each and every month hereafter, beginning March 1, 1969, and shall accrue from the date of the actual disbursement of funds, and shall be based on amounts actually disbursed from the construction fund. Interest at the rate of Eight and Five Tenths (8.5%) Percent per annum on $7,000,000.00, less any principal reductions, shall be payable on the first day of each and every month dhereafter commencing April 1, 1970.

The entire unpaid principal indebtedness shall be due and payable on September 1, 1970.

Larger sums may be paid at any time, but the payment of any larger or additional sum in advance of the payments herein required shall not relieve the makers of the payment of the regular monthly interest installment herein provided for. Interest shall be computed and payable in advance at the rate of Eight and Five Tenths (8.5%) Percent per annum. This note shall be considered in default when any payment required to be made hereunder shall not be paid within thirty (30) days of its due date, and shall remain in default until said payment shall have been made. While in default, this note shall bear interest at the rate of Nine (9%) Percent per annum.

All persons now or hereafter becoming parties hereto severally waive demand, notice of non-payment and protest, and jointly and severally agree that in the event of default in the payment of any installment due hereunder for a period of thirty (30) days, the whole of said indebtedness shall thereupon, at the option of the holder, become immediately due and payable, and if this note becomes in default and is placed in the hands of an attorney for collection, to pay reasonable attorney's fees for the collection thereof.

This note is secured by a mortgage of even date and the terms of said mortgage are incorporated herein and made a part hereof. In the event of variance between this note and said mortgage, the terms of the mortgage shall take precedence.

BURLEIGH HOUSE, INC.

By _____

Herbert Buchwald, President

Attest _____

M. Millio, Secretary

THIS IS A MORTGAGE DEED. Dated this 26th day of February, 1969.

By BURLEIGH HOUSE, INC., a Florida corporation
7100 Collins Avenue
Miami Beach, Florida

Hereinafter called the MORTGAGOR (Debtor-Record Owner), to MIAMI BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, hereinafter called the ASSOCIATION (The Secured Party), 401 Lincoln Road, Miami Beach, Florida.

To secure the repayment of the note hereinafter described, the property encumbered is as follows:

Lots 1, 2, 3, 4, 5, and 6, inclusive, in Block 9 of NORMANDY BEACH SOUTH, according to the Plat thereof as recorded in Plat Book 21 at page 54 of the Public Records of Dade County, Florida.

Together with all gas, steam, electric, water, heating, cooking, refrigerating, lighting, plumbing, ventilating, irrigation, power, and air-conditioning systems, machines, appliances, and appurtenances, whether affixed or not and any replacements of and additions to any of the foregoing located thereon.

(Documentary stamps affixed to note and cancelled)

The Mortgagor has executed a promissory note of even date herewith to the order of the ASSOCIATION in the principal amount of $7,000,000.00, with interest (while not in default) at the rate of 8.50%, repayable as provided for in note.

The Mortgagor hereby covenants and agrees to comply with and to be bound by the terms of this Agreement, including each and every one of the covenants and agreements contained in the Master Mortgage filed in Official Records Book 3877, page 121; Official Records Book 2688, page 59; Official Records Book 928, page 724, and Official Records Book 153, page 166 of the Public Records of Dade, Broward, Palm Beach and Collier Counties, Florida, respectively, which Master Mortgage is incorporated by reference herein to the same extent as if said Master Mortgage, in its entirety, had been set forth herein verbatim.

If any of the sums of money herein referred to be not promptly and fully paid within thirty (30) days next after the same severally become due and payable, or if each and every the stipulations, agreements, conditions and covenants of said promissory note and this deed, or either, are not duly performed, complied with, and abided by, the aggregate sum advanced by the Association to the Mortgagor under the terms of the promissory note and this deed then remaining unpaid, less any consideration received by the Association for making this loan after deducting the costs of the Association in making this loan, shall become due and payable forthwith or thereafter at the option of the Association, as fully and completely as if said aggregate sum of money were originally stipulated to be paid on such a day, anything in said promissory note or herein to the contrary notwithstanding. It is the intention of the Association that in no event should the mortgagor pay more than the legal rate of interest allowed under the Laws of the State of Florida. The provisions of this paragraph shall apply to this mortgage in lieu of the provisions of Paragraph 8 in the above described Master Mortgage.

Receipt of a copy of such Master Mortgage and of the above described note (unconformed) is herewith acknowledged by the Mortgagor.

IN WITNESS WHEREOF, the said Mortgagor has caused these presents to be duly executed the day and year here first above written, at Miami Beach, Florida.
Signed, sealed and delivered in the presence of:

MIAMI BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION	BURLEIGH HOUSE, INC.
By Frank C. Rauhl, Asst. Secy.	By Herbert Buchwald President
	Attest M. Millis Secretary

STATE OF FLORIDA, COUNTY OF DADE: ss

I hereby certify that _____ to me personally known, this day acknowledged before me that _____ executed the foregoing mortgage, and I FURTHER CERTIFY that I know the said person(s) making said acknowledgment to be the individual(s) described in and who executed the said mortgage.

I hereby certify that HERBERT BUCHWALD and M. MILLIS respectively _____ President and _____ Secretary of BURLEIGH HOUSE, INC., a Florida corporation to me personally known, this day acknowledged before me that they executed the foregoing mortgage as such officers of said corporation and that they affixed

thereto the official seal of said corporation and I further certify that I know the said persons making said acknowledgment to be the individuals described in and who executed the said mortgage.

IN WITNESS WHEREOF, I hereunto set my hand and official seal at Miami Beach, Dade County, Florida, this 26th day of February, 1969.

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY.

CASE NO. 72-19709 — Judge Cullen

BURLEIGH HOUSE, INC.,

Plaintiff,

vs.

FINANCIAL FEDERAL SAVINGS AND
LOAN ASSOCIATION,

Defendant.

MOTION TO DISMISS AMENDED COMPLAINT

The defendant moves the Court to dismiss plaintiff's amended complaint herein on the following ground:

failure to state a cause of action.

The specific grounds and matters of law to be argued in support of this motion are as follows:

The complaint seeks damages for alleged usury charged on a loan. The complaint alleges as a legal conclusion that "interest of 21% per annum" was "willfully, maliciously and intentionally" exacted. None of the ultimate facts necessary to state a cause of action for usury are alleged.

The complaint does not allege any of the following:

1. what interest was charged, or

2. what interest was paid, or

3. when what interest was paid, or

4. how much money was borrowed, or

5. how long what sums were borrowed.

Plaintiff's failure to allege any of the above facts makes it impossible for either the Court or this defendant to determine whether plaintiff has a cause of action. "It is a fundamental principle of pleading that the complaint, to be sufficient, must allege ultimate facts as distinguished from legal conclusions which, if proved, would establish a cause of action for which relief may be granted." MAIDEN v. CARTER (Fla.App.1970), 234 So2d. 168.

In OCALA LOAN COMPANY v. SMITH (Fla.App. 1963), 155 So.2d 715-716, the applicable law is stated as follows:

> "The complaint must be so framed as to allege the wrong complained of with sufficient certainty to clearly apprise the court and the defendant of the nature of the claim asserted. Mere legal conclusions are fatally defective unless substantiated by sufficient allegations of ultimate fact; and every fact essential to the cause of action must be pleaded distinctly, definitely, and clearly. . . ."

With specific reference to pleading sufficient facts to establish usury, the following authorities are in point:

E. O. PAINTER FERTILIZER CO. v. FOSS (Fla.1932), 145 So. 253; 91 C.J.S. Usury, §110; 55 Am.Jur. Usury, §160.

Respectfully submitted,

SAM DANIELS

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
374-8171
Attorney for Defendant.

I HEREBY CERTIFY that on this 23rd day of April, 1973, a true copy of the foregoing Motion to Dismiss was mailed to LAPIDUS & HOLLANDER, Attorneys for Plaintiff, 410 City National Bank Building, Miami, Florida 31130.

SAM DANIELS

SAM DANIELS

[TITLE OMITTED]

NO. 72-19709 — (Judge Goodhart)

ANSWER TO AMENDED COMPLAINT

The defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, files this, its answer to plaintiff's amended complaint, and says:

1. Paragraph 1 is admitted.

2. The first sentence of paragraph 2 is admitted. Further answering paragraph 2, defendant says that the note is the best evidence of the terms thereof.

3. Paragraph 3 is admitted except for the allegation that "Financial Federal was told by the Plaintiff, and well knew, that it would be impossible to complete the building by April 1, 1970", which allegation is denied.

4. Paragraphs 4-9 are denied.

5. Further answering the amended complaint, defendant denies each and every allegation not expressly admitted herein.

6. Further answering the amended complaint, defendant says that some or all of plaintiff's claims are time barred by F.S.A. 95.11.

7. With reference to the More Definite Statement dated May 11, 1973, and filed herein by plaintiff, said More Definite Statement merely incorporates by reference certain of defendant's answers to first interrogatories previously filed herein which answers are themselves the best evidence of the contents thereof.

8. Further answering the amended complaint, defendant says that the same fails to state a cause of action.

SAM DANIELS

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Phone 374-8171
Attorney for Defendant.

I HEREBY CERTIFY that on this 30th day of May, 1973, a true copy of the foregoing Answer to Amended Complaint was mailed to LAPIDUS & HOLLANDER, Attorneys for Plaintiff, 410 City National Bank Building, Miami, Florida 33130.

SAM DANIELS

SAM DANIELS

[TITLE OMITTED]

MOTION FOR SUMMARY JUDGMENT

The defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, moves the Court to enter Summary Judgment in its favor on the ground that no genuine issue of material fact exists and defendant is entitled as a matter of law to the entry of final judgment in its favor.

The amended complaint seeks recovery of damages from defendant under F.S.A. Chpt. 687 for alleged violation of Florida's usury laws. Under F.S.A. Chpt. 665 and F.S.A. Chpt. 687, defendant, a federal savings and loan association, is now and at all times material in the past has been exempt from the provisions of F.S.A. Chpt. 687 regarding usury.

SAMS, ANDERSON, ALPER,
SPENCER & POST, P.A.
Seventh Floor, Concord Building
Miami, Florida 33130

and

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Defendant

By SAM DANIELS

SAM DANIELS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July, 1973, a true copy of the foregoing Motion for Summary Judgment was delivered to LAPIDUS & HOLLANDER, Attorneys for Plaintiff, 410 City National Bank Building, Miami, Florida 33130.

SAM DANIELS

SAM DANIELS

[TITLE OMITTED]

MEMO IN SUPPORT OF DEFENDANT FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT

I.

THE LEGAL ISSUE

Plaintiff claims that defendant charged it interest in excess of 15% on a loan and that the loan was usurous under F.S.A. Chpt. 687. If plaintiff's version of the facts and law were correct, the penalty imposed under Chpt. 687

would be the forfeiture of all interest paid on the loan. TEL SERVICE CO. v. GENERAL CAPITAL CORPORATION (Fla.1969), 227 So.2d 667.

The defendant is a federal savings and loan association and has moved for summary judgment on the ground that F.S.A. Chpt. 687 does not apply to such federal associations.

II.

SOME BACKGROUND POLICY CONSIDERATIONS

Usury laws are designed to protect hard-pressed debtors from overreaching creditors. The forfeiture and penalties provided for in usury laws are designed to deter creditors in general from charging more for the use of money than the law allows.

When the lendor is subject to strict governmental regulation regarding interest charges, he is usually exempt from the general usury laws. In such cases there is no need for private penalties and forfeitures, which are not favorites of the law, since the lendors' books, records and charges are the subject of periodic governmental audits and controls.

Federal associations are regulated by the Federal Home Loan Bank Board and under 12 U.S.C. § 1425 cannot charge interest on home loans in excess of "the lawful contract rate" or that allowed by the Board's regulations. Under § 1425, a federal association can lose its charter if its interest charges are too high. Since federals are faced

with a federal death penalty for excessive charges, there is manifestly no need for additional state penalties and forfeitures.

Florida, federal, and out-of-state savings and loan associations are also regulated to varying degrees under the provisions of F.S.A. Chpt. 665. As shown, infra, the usury provisions of Chpt. 687 do not apply to any savings and loan associations because such associations are subjected to such comprehensive governmental regulation.

III.

STATUTORY PROVISIONS EXEMPTING SAVINGS AND LOAN ASSOCIATIONS FROM USURY LAWS

The note and mortgage which plaintiff claims was usurous were executed in February of 1969. At that time, F.S.A. 687.031 provided (and still provides) that:

> "Sections 687.02 and 687.03 shall not be construed to repeal, modify or limit any or either of the special provisions of existing statutory law creating exceptions to the general law governing interest and usury (chapter 687) and specifying the interest rates and charges which may be made pursuant to such exceptions, including but not limited to those exceptions which relate to banks, Morris plan banks, discount consumer financing, small loan companies and domestic building and loan associations. Laws 1955, c. 29705, § 3."

In February of 1969, F.S.A. 665.40 provided in pertinent part that:

> ". . . Federal savings and loan associations and stockholders therein shall be entitled to the same exemptions from taxation or otherwise that are now provided by law or which may hereafter be provided by law for Florida building and loan associations and all laws now existing, providing any such exemptions are hereby made applicable to federal savings and loan associations and stockholders therein."

Moreover, F.S.A. 665.161, then provided that:

> "No fines, interest or premiums paid on loans made by any building and loan association[1] shall be deemed usurious, and the same may be collected as debts of like amount are now collected by law in this state, and according to the terms and stipulations of the agreement between the association

[1]F.S.A. 665.01 read as follows in February of 1969: "Every association heretofore or hereafter incorporated under any law providing for the incorporation of building, loan fund and saving associations, and every association heretofore or hereafter incorporated under any law for the purpose of accumulating funds for the use and benefit of its members, and of assisting them to accumulate money and to invest their funds and savings by cash or periodical payments on its stock or otherwise, to be loaned among its members, shall be known in this chapter as a building and loan association, and shall be subject to the provision of this chapter, except as stipulated in § 665.33. Associations organized under the laws of this state shall be known as 'domestic' associations, and those organized under the laws of any other state, territory, or nation, shall be known as 'foreign' associations. Such 'domestic' associations may carry out their purposes, and may be organized in part or wholly under the general laws of Florida relating to corporations, except as othewise provided in this chapter."

> and the borrower. Formerly § 668.09. Transferred and renumbered § 665.161, Laws 1963, c. 63-318, § 2."

On June 2, 1969, F.S.A. 665.161 was renumbered to become F.S.A. 665.395. On the same day, F.S.A. 665.511 became effective, which provides:

> "Federal savings associations or federal savings and loan associations, incorporated pursuant to the laws of the United States, as now or hereafter amended, are not foreign corporations or foreign associations. Unless federal laws or regulations provide otherwise,[2] federal associations and the members thereof shall possess all of the rights, powers, privileges, benefits, immunities and exemptions that are now provided or that hereafter may be provided by the laws of this state for associations organized under the laws of this state and for the members thereof. This provision is additional and supplemental to any provisions which, by specific reference, is applicable to federal associations and the members thereof."

To the extent that plaintiff's usury claims are based on events occurring prior to June 2, 1969, the defendant

[2]Federal rules and regulations do not prohibit state law exemptions of federal associations from usury laws. In discussing the effect of 12 U.S.C. § 1425, the dourt in JOLIET FEDERAL SAV. & L. ASS'N v. BLOOMINGTON LOAN CO., 265 N.E.2d 400, 403, said:

> ". . . This act of Congress relates to membership in the system and does not prohibit the state from exempting a Federal Savings and Loan Association from the operation of its usury laws . . ."

federal association was exempt from the usury laws under F.S.A. 687.031, 665.40 and 665.161. To the extent that plaintiff's claims are based on conduct occurring after June 2, 1969, defendant's exemption is found in F.S.A. 687.031, 665.395 and 665.511.

Usury was unknown at common law and statutes exempting persons from the operation of general usury laws are "restorative of the common law". YAFFEE v. INTERNATIONAL COMPANY (Fla.1955), 80 So.2d 910. Moreover, statutes imposing civil penalties are strictly construed in favor of the one against whom imposition of a penalty is sought. In this regard, the Supreme Court said in HOTEL AND RESTAURANT COM'N v. SUNNY SEAS NO. ONE (Fla.1958), 104 So.2d 570:

> ". . . And it is well settled that statutes imposing a penalty must always be construed strictly in favor of the one against whom the penalty is imposed and are never to be extended by construction. See Lee v. Walgreen Drug Stores Co., 1942, 151 Fla. 648, 10 So.2d 314; Lollie v. General American Tank Storage Terminals, 1948, 160 Fla. 208, 34 So.2d 306.

The fact that the Legislature indicated in subsection (2) of § 561.291 that the statute should be liberally construed to effectuate its public purpose cannot prevail over a principle of law as firmly established in our jurisprudence as that referred to above. The language of Mr. Chief Justice Marshall in United States v. Wiltberger, 5 Wheat. 76, 95-96, 5 L.Ed. 37, while referring to criminal

penalties, is equally applicable to statutes imposing a civil penalty:

> 'The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.' "

To prevail, plaintiff must claim that Florida's usury laws apply to federal but not state savings and loan associations. No reason suggests itself as to why this should be the case. The statutes clearly provide the contrary.

It is of no little significance that in the entire judicial history of this State, there is no case on the books holding Florida's usury laws applicable to either state or federal associations.

In SPINNEY v. WINTER PARK BUILDING & LOAN ASS'N. (Fla.1935), 162 So. 899, 903, the Supreme Court held that a domestic building and loan association was exempt from the general usury laws, saying:

> "The Legislature of Florida has seen fit to authorize building and loan associations to provide for fines or interest for nonpayment of dues, premiums, or interest not to exceed 5 cents per share for each monthly delinquency, and it is further

provided that all fees, fines, premiums, and interest shall be provided for in the bylaws and shall be credited to earnings out of which expenses and dividends shall be paid, and it is further provided that no such charges or payments shall be deemed usurious, even if in some cases exceeding the legal rate of interest, and it is provided further that same may be collected by law as other debts of like amounts are collected in this state.

So, under the allegations of the bill, the Johnsons themselves could not have interposed the defense of usury."

Most states contain statutes in one form or another exempting building and loan associations from usury laws under certain circumstances. The early cases are collected in an annotation at 74 A.L.R. 973. The issue is also discussed in 13 Am.Jur.2d, Building & Loan Assoc., § 57 and in 12 C.J.S., Building & Loan Assoc., § 77 ("It is generally held, frequently by virtue of statute, that building and loan associations, due to their peculiar nature, are not subject to the general usury laws.")

CONCLUSION

It is respectfully submitted that defendant's motion for summary judgment should be granted.

Respectfully submitted,

SAMS, ANDERSON, ALPER,
SPENCER & POST, P.A.
7th Floor, Concord Building
Miami, Florida 33130

By_____
MURRAY SAMS

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 1973, a true copy of the foregoing Memo was mailed to LAPIDUS & HOLLANDER, Attorneys for Plaintiff, 410 City National Bank Building, Miami, Florida 33130.

SAM DANIELS

[TITLE OMITTED]

ASSIGNMENTS OF ERROR

The defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, hereby assigns the following as error to be relied upon for reversal of this cause on appeal.

1. The Court erred in denying defendant's motion for a summary judgment.

2. The Court erred in entering Final Judgment for plaintiff.

3. The Court erred in finding and holding in said final judgment that:

> ". . . On December 20th, 1968, the Defendant requested the Plaintiff to sign a formal Application Letter (Plaintiff's Exhibit No. 1). The Application was for an eighteen month construction loan. . . ."

4. The Court erred in finding and holding in said final judgment that:

> ". . . On January 6th, 1969, the Defendant issued its Commitment Letter (Plaintiff's Exhibit No. 2). The commitment was for an eighteen month construction loan of $7,000,000.00."

5. The Court erred in finding and holding in said final judgment that:

> ". . . Plaintiff signed the Commitment and paid the Defendant another $39,000.00 fee. At this point, Defendant had refused to provide a combination construction and permanent loan. It was clearly structuring two separate loans. . . ."

6. The Court erred in finding and holding in said final judgment that:

> "This Court finds that at the time of making the loan, the Defendant knew it would take eighteen months to construct the building and the thirteen month provision for the running of interest was deliberately inserted as a device for exacting greater interest from the borrower."

7. The Court erred in finding and holding in said final judgment that:

> "The Defendant charged as 'closing costs' on this loan $390,000.00. . . ."

8. The Court erred in finding and holding in said final judgment that:

> "Florida has held that the actual and reasonable expenses of making a loan may be passed on to the borrower but all other fees are chargeable as interest. . . ."

9. The Court erred in finding and holding in said final judgment that:

> "The Defendant charged the Plaintiff $390,000.00 to cover actual expenses of $66,812.00. This Court finds

that $328,188.00 of 'closing costs' were in fact interest, exacted as such and denoted as income on the books of the Defendant Association, as reflected in the testimony. . . ."

10. The Court erred in finding and holding in said final judgment that:

". . . Defendant has argued that §665.401 F.S., F.S.A. allows it to make this charge. That Statute became effective four months after the loan here at issue was made. This Statute does not apply. . . ."

11. The Court erred in finding and holding in said final judgment that:

". . . Even if it did, the Statute states:

'In lieu of such initial charges to cover such expenses and costs an association may make a reasonable charge, all or part of which may be retained by the association which renders such service or part or all of it may be paid to others who render such service . . .'

Charging a borrower $390,000.00 to cover actual out-of-pocket expenses of $66,812.00 is not a 'reasonable charge' within the meaning of that Statute."

12. The Court erred in finding and holding in said final judgment that:

"The effective rate of interest on the eighteen month construction loan was in excess of 15%. Both Plaintiff and Defendant's accountants have testified to this. . . ."

13. The Court erred in finding and holding in said final judgment that:

". . . Defendant exacted interest on an eighteen month loan of $652,169.24. . . ."

14. The Court erred in finding and holding in said final judgment that:

". . . It did so with the requisite intent to take more than the legal rate for the use of the money loaned."

15. The Court erred in finding and holding in said final judgment that:

". . . In substance, this loan was an eighteen month construction loan. . . ."

16. The Court erred in finding and holding in said final judgment that:

". . . On September 1st, 1970, the Defendant had the right to demand payment in full of principal and interest (Plaintiff's Exhibit No. 8). . . ."

17. The Court erred in finding and holding in said final judgment that:

". . . The Defendant credited all of the 'closing costs' to interest on this eighteen month construction loan. The closing statement reflected the charges as charges on this loan (Plaintiff's Exhibit No. 9). Although it eventually placed some, but not all, of the permanent mortgages, these were clearly separate loans, interest

upon which varied and was not set until construction was almost completed. Thus they were separate and distinct loans. Usury depends upon the scope of rights which the lender possess Home Credit Company v. Brown, Fla. 148 So.2d 257. The 'closing costs' were included in the money lent. Defendant had the right to be repaid this money in eighteen months. They are clearly, by agreement of the parties, charges for the construction loan alone."

18. The Court erred in finding and holding in said final judgment that:

"Defendant has raised the Statute of Limitations by affirmative defense. It had the burden to prove its defense. It did not carry its burden. It offered no proof."

19. The Court erred in finding and holding in said final judgment that:

"The Plaintiff testified that the last payment of interest on this construction loan was made by check dated September 28, 1970 (Plaintiff's Exhibit No. 18). Defendant's interrogatories admit the payment was received on September 30th, 1970, and credited to interest on the construction loan (Plaintiff's Exhibit No. 20). Suit was commenced September 25th, 1972, prior to the time the Statute ran."

20. The Court erred in finding and holding in said final judgment that:

"Neither the old Act nor the new, exempts the Defendant from the Usury Acts. See First Federal Savings & Loan Association v. Norwood Realty Co., Ga. 93, S.E. 2d 793."

21. The Court erred in finding and holding in said final judgment that:

". . . the Plaintiff, BURLEIGH HOUSE, INC., have and recover a judgment against the Defendant, FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION in the amount of $652,169.24. . . ."

SAMS, ANDERSON, ALPER
& POST, P.A.
7th Floor, Concord Building
Miami, Florida 33130
and
SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Defendant

By Sam Daniels

SAM DANIELS

I HEREBY CERTIFY that on this 5th day of October, 1973, a true copy of the foregoing Assignments of Error was mailed to LAPIDUS & HOLLANDER, Attorneys for Plaintiff, 410 City National Bank Building, Miami, Florida 33130.

SAM DANIELS

SAM DANIELS

II.

POINTS ON APPEAL

The points on appeal are:

I.

WHETHER THE LOWER COURT ERRED IN HOLDING THAT, AT ALL TIMES HERE MATERIAL, FEDERAL SAVINGS AND LOAN ASSOCIATIONS WERE NOT EXEMPT FROM THE USURY PENALTIES PROVIDED FOR IN F.S.A. CHAPTER 687. (Raised by Assignments of Error Nos. 1-2, 20-21. R. 335-339).

II.

WHETHER THE LOWER COURT ERRED IN HOLDING THAT ALL COSTS DEEMED INTEREST SHOULD ONLY BE "SPREAD" OVER AN EIGHTEEN MONTH PERIOD. (Raised by Assignments of Error Nos. 1-5, 12-13, 15-17, 21. R. 335-339).

III.

WHETHER THE LOWER COURT ERRED IN HOLDING THIS SUIT WAS BROUGHT WITHIN THE REQUIRED TWO YEAR STATUTE OF LIMITATIONS PERIOD APPLICABLE IN ACTIONS TO RECOVER STATUTORY PENALTIES. (Raised by Assignments of Error Nos. 1-2, 18-19. R. 335-339).

Points on Appeal re Brief of Appellant submitted January 23, 1974.

IV.

WHETHER THE LOWER COURT ERRED IN FINDING AND HOLDING THAT WITH THE EXCEPTION OF THE $66,812 PAID TO OTHERS, ALL OF THE $390,000 COMMITMENT FEE AND ADDITIONAL CLOSING COSTS (SOME $328,188) WAS "IN FACT INTEREST" UNDER F.S.A. CHAPTER 687. (Raised by Assignments of Error Nos. 2, 7-13, 21. R. 335-339).

V.

WHETHER THE LOWER COURT ERRED IN FINDING AND HOLDING THAT THE FEDERAL INTENDED TO VIOLATE F.S.A. CHAPTER 687. (Raised by Assignments of Error Nos. 2, 5-6, 14, 21. (R. 335-339).

665.01 Associations affected; "domestic" and "foreign" associations.—Every association heretofore or hereafter incorporated under any law providing for the incorporation of building, loan fund and saving associations, and every association heretofore or hereafter incorporated under any law for the purpose of accumulating funds for the use and benefit of its members, and of assisting them to accumulate money and to invest their funds and savings by cash or periodical payments on its stock or otherwise, to be loaned among its members, shall be known in this chapter as a building and loan association, and shall be subject to the provision of this chapter, except as stipulated in §665.33. Associations organized under the laws of this state shall be known as "domestic" associations, and those organized under the laws of any other state, territory, or nation, shall be known as "foreign" associations. Such "domestic" associations may carry out their purposes, and may be organized in part or wholly under the general laws of Florida relating to corporations, except as otherwise provided in this chapter.

History.—§1, ch. 10028, 1925; §1, ch. 11865, 1927; CGL 6151.

665.161 Collection of fines, interest or premiums on loans made by building and loan associations.—No fines, interest or premiums paid on loans made by any building and loan association shall be deemed usurious, and the same may be collected as debts of like amount are now collected by law in this state, and according to the terms and stipulations of the agreement between the association and the borrower.

History.—§8, ch. 4158, 1893; GS 2755; RGS 4242; CGL 6192; §2, ch. 63-318.

Note.—Tr. from §668.09.

cf.—Ch. 687, Interest and usury.

665.21 Regulation of loans to stockholders, etc.—

(1) Any association shall have power to loan or advance to stockholders or members thereof money of the association, including money paid for capital stock as provided in §665.05 and to secure payment of such money and the performance of all of the conditions upon which the loans are made by pledge of shares in said association, or by note, or bond, and mortgage on real estate situated in the state, or situated in another state if located within one hundred miles of the principal office of the association, owned in fee or leased for a period extending or renewable automatically for at least ten years beyond the date specified for the final principal payment of the loan obligation, by the borrower, which mortgage shall be a first lien thereon, except taxes and special assessments, and except the prior liens held and owned by said association, provided, however, that nothing herein shall be construed to prohibit any association from accepting additional collateral of any character as additional security for the payment of a loan previously consummated; to loan funds of the association (except that portion of its authorized capital stock specified in §665.05) upon the pledge of the shares only of such association, provided, that loans on stock shall not exceed one hundred per cent of the withdrawal value of stock at the time it is pledged. All notes, bonds and other obligations bearing date prior to January 1, 1942, which are held by savings, building and loan associations having their principal place of business in the state, and which are secured by mortgage, deed of trust or other lien upon real property

situated in Florida shall be exempt from the provisions of chapters 199 and 201 and any law superseding same or amendatory thereof.

(2) The by-laws of each association shall prescribe the manner of awarding loans, the rate of interest and the premium to be charged and the time and manner in which the interest and premium, if any, shall be paid. No such association is required to maintain uniformity among loans made by it with respect to rates of interest, maturity of principal, plan of repayment, amount and time of payment of installments upon principal, and other terms, provisions and conditions of such loans and the contract evidencing them, but may, when authorized by its by-laws, make loans with differences between them with respect to rates of interest, maturity of principal, plan of repayment, amount and time of payment of installments upon principal, and other terms, provisions and conditions of such loans and the contracts evidencing them, and is authorized to make loans at such rate of interest and with such maturity of principal, such plan of repayment, such amount and time of payment of installments upon principal, and such other terms, provisions and conditions of such loans and the contracts evidencing them, as its by-laws may prescribe, provided, all loans shall conform to all requirements of law with respect to the character, extent and value of the security therefor.

(3) No building and loan association shall make any loan either directly or indirectly to any of its officers, directors or employees, provided, however, that loans may be made to an officer, director or employee if secured by a mortgage upon his home or by an assignment of the stock owned by him in the association. Loans made to officers,

directors or employees, secured by assignment of stock, shall not exceed ninety per cent of the withdrawal value of the stock at the time the loan is made.

(4) Building and loan associations shall lend their funds only on the security of their own shares or on the security of first liens upon homes or combination homes and business property in accordance with rules and regulations promulgated by the comptroller, except that not exceeding twenty per cent of the assets of such association may be loaned on other improved real estate without regard to said ninety per cent limit, but secured by first lien thereon.

(5) In case there is not sufficient demand for loans on the part of stockholders on real estate mortgages or the stock of the association, which are acceptable to the board of directors, any association shall have the power to lend its funds upon or purchase first mortgages upon improved real estate, provided, the loans secured by the mortgage purchased or accepted as collateral does not exceed seventy per cent of the fair value of the real estate mortgaged, and also to lend its funds upon or invest in the obligations of the United States, Florida, any county or municipality of the state, any federal home loan bank or the home owners loan corporation, and also to lend its funds upon or purchase the stock or promissory notes of any other domestic building and loan association, or invest in the savings shares or investment shares of federal savings and loan association, doing business in the state.

(6) Upon the approval of the state comptroller any building and loan association may subscribe and pay for shares of stock in any federal home loan bank or other

federal or reserve corporation, created or authorized by the laws of the United States or this state, to lend money to building and loan association or any federal savings and loan association and may purchase, sell or hypothecate the securities, bonds, notes or debentures issued by any such federal home loan bank or other federal or reserve corporation or federal savings and loan association and payment for such stock, securities, bonds, notes, or debentures may be made from any funds which the association may have on hand or by the transfer of any other assets. All subscriptions to or purchase of any stock, securities, bonds, notes or debentures heretofore made by an association are hereby validated, confirmed and made legal.

(7) The provisions of §665.25(3) prohibiting the assignment or transfer of evidences of indebtedness or mortgages securing the same taken by any building and loan association for the payment of any loan shall not apply to:

(a) The investments permitted by this section, or to notes and mortgages received by the association to evidence and secure the balance of the sale price of any real estate sold by it, provided such latter notes are not secured by the assignment of shares of stock in the association; or,

(b) The sale of any loan by a domestic association at any time if the total dollar amount of loans sold, including such sale, within the calendar year beginning January 1 immediately preceding the date of such sale, does not exceed a sum equivalent to twenty per cent of the dollar amount of all loans held by such domestic association at the beginning of such calendar year. The limitation upon the sale of loans may be adjusted in the case of any domestic association upon application to and approval by the state

comptroller. All loans sold shall be sold without recourse, and if under a contract to service the same, then on a basis to provide sufficient compensation to the domestic association to reimburse it for expenses incurred under its service contract.

(8) Without regard to any other provision of this section any domestic association whose general reserves, surplus and undivided profits aggregate a sum in excess five per cent of its withdrawable accounts is authorized to invest an amount not exceeding at any one time five per cent of such withdrawable accounts in loans to finance the development of land or the acquisition and development of land for primarily residential usage, subject to such rules and regulations as the comptroller may prescribe; provided, however, that no such loan shall exceed sixty per cent of the appraised value of the property to be developed.

(9) Subject to the approval of the state comptroller, any domestic association which is a member of the federal home loan bank system and whose accounts are insured by the federal government or an instrumentality thereof, without regard to any other provision of this section to the contrary, may make any loan or investment which such association could make were it incorporated and operating as a federal association domiciled in this state.

History.—§20, ch. 10028, 1925; §15, ch. 11865, 1927; §3, ch. 15908, 1933; §1, ch. 16842, 1935; §1, ch. 16844, 1935; CGL 1936 Supp. 6183(2); §1, ch. 19110, 1939; §1, ch. 20931, 1941; §7, ch. 22858, 1945; §1, ch. 23949, 1947; §1, ch. 59-241; §1, ch. 61-137; §1, ch. 63-206; §3, ch. 65-7; §1, ch. 67-95.